

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of Petition of MCImetro Access                    ) WC Dkt. No. 02-283  
Transmission Services LLC for Expedited                        )  
Preemption    )

**OPPOSITION OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC TO  
VERIZON'S PETITION FOR CLARIFICATION OR RECONSIDERATION**

Pursuant to section 1.106(g) of the Federal Communication Commission's ("FCC" or "Commission") rules,<sup>1</sup> MCImetro Access Transmission Services LLC ("MCImetro"), by its attorneys, submits this Opposition to Verizon's Petition for Clarification or Reconsideration ("Verizon's Petition") of the Commission's Order in the above-captioned proceeding.<sup>2</sup> Verizon apparently filed its Petition on December 23, 2002 but never served MCImetro or the New York Public Service Commission ("New York PSC" or "NY PSC"), as required by section 1.106(f) of the Commission's rules.<sup>3</sup> Verizon asks the Commission to recast the issue to be decided in this case as "whether the existing agreement between MCImetro and Verizon New York requires Verizon New

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<sup>1</sup>47 C.F.R. § 1.106(g).

<sup>2</sup>In the Matter of MCImetro Access Transmission Services, LLC Petition for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, Memorandum Opinion and Order, WC Docket No. 02-283, DA 02-389 (rel. Nov. 26, 2002).

<sup>3</sup>Verizon never served its Petition for Clarification or Reconsideration on MCImetro which is a clear violation of the Commission's Rules. 47 C.F.R. § 1.106(f). The only way MCImetro learned of the existence of Verizon's Petition is as a result of a call from FCC Enforcement Bureau staff inquiring as to whether MCImetro intended to file an Opposition. MCImetro received this inquiry on the date that the Opposition would have been due. In light of the defective service, FCC staff indicated that it would treat the date WorldCom learned of Verizon's Petition, January 7, 2003, as the date of service.

York to pay compensation to MCImetro for the delivery of ISP-bound traffic."<sup>4</sup> Verizon's Petition is both procedurally and substantively defective and should be denied.

As an initial matter, Verizon's request is procedurally improper. Verizon did not object to the content or form of the three questions on which MCImetro sought preemption in its Comments or Reply to MCImetro's Petition for Preemption ("MCImetro's Petition").<sup>5</sup> MCImetro's Petition clearly identified the nature of the dispute and the three issues on which it sought preemption.<sup>6</sup> In response, Verizon specifically stated that it "does not oppose MCImetro's request that the Commission preempt the New York PSC."<sup>7</sup> Instead, Verizon argued the merits of its position and asked that the "Commission preempt and at the same time summarily reject MCImetro's position on the merits."<sup>8</sup> If Verizon disputed the scope of MCImetro's Petition, it should have said so in its Comments. It is improper for Verizon to use a petition for reconsideration as a means to take "a second bite at the apple" after the Commission has ruled and rejected Verizon's request for relief.<sup>9</sup>

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<sup>4</sup>Verizon's Petition at 2.

<sup>5</sup>In the Matter of MCImetro Access Transmission Services, LLC Petition for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, Petition of MCImetro Access Transmission Services LLC, WC Docket No. 02-283 (filed Sept. 6, 2002)

<sup>6</sup>See e.g. MCImetro Petition at iv.

<sup>7</sup>Verizon Comments at 1.

<sup>8</sup>Id.

<sup>9</sup>47 C.F.R. 1.106; In re American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, 15 F.C.C.R. 15448, ¶ 7 (2000). ("Reconsideration is appropriate only where the petitioner either shows a material error

Verizon's Petition is also substantively defective. Verizon would have the Commission determine whether reciprocal compensation for calls to ISPs is owed under the parties' interconnection agreement. MCImetro's Petition, however, asked whether the Commission's ISP Remand Order<sup>10</sup> impacts Verizon's obligation to pay reciprocal compensation under the parties' interconnection agreement. There is no legal basis for the Commission to preempt the New York PSC on the issue Verizon identifies. Under the 1996 Act, the Commission can preempt a state commission only where it unambiguously fails to carry out its responsibility under the 1996 Act.<sup>11</sup> The NY PSC has not failed to carry out its responsibility as to the issue Verizon identifies.

As MCImetro detailed in its Petition, in 1999, the NY PSC undertook an industry-wide re-examination of reciprocal compensation under interconnection agreements in New York, focusing on traffic bound for ISPs and competitive local exchange carriers whose customers were predominantly ISPs. Following an evidentiary hearing and briefing by the parties, the NY PSC determined in its Opinion No. 99-10 that ISP-bound traffic remained subject to the payment of reciprocal compensation under interconnection agreements. It found that there was no basis to treat ISP-bound traffic differently from other traffic that is subject to reciprocal compensation, absent express contract language

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or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.")

<sup>10</sup>Order on Remand & Report & Order, In re Implementation of the Local Competition Provisions in the Telecom Act of 1996, Intercarrier Comp. for ISP-Bound Traffic, FCC 01-131, CC Docket Nos. 96-98, 99-68 (rel. Apr. 27, 2001).

<sup>11</sup>47 U.S.C. § 252(e)(5).

<sup>12</sup>NY PSC Case 99-C-0529. Proceeding on Mot'n of the Comm'n to Reexamine Reciprocal Compensation, Opin. No. 99-10, Opinion and Order Concerning Reciprocal

so declaring.<sup>12</sup> In doing so, the NY PSC established a rebuttable presumption regime in New York. Without upsetting existing interconnection agreements, the NY PSC ruled that CLECs whose ratios of terminating-to-originating traffic exceeded 3:1 would be paid reciprocal compensation at a lower, "end office" rate, while CLECs whose ratios did not exceed 3:1 would continue to be paid reciprocal compensation at the higher "tandem" rates.<sup>13</sup>

Subsequent to Opinion No. 99-10, Verizon began paying the lower "end office" rate to two other WorldCom subsidiaries whose ratios of terminating-to-originating traffic exceeded 3:1. However, MCImetro continued to bill and Verizon continued to pay reciprocal compensation rates at the higher tandem rates because MCImetro's terminating-to-originating traffic ratio does not exceed the 3:1 threshold. Verizon conceded as much during the course of a dispute over payment to the other two WorldCom subsidiaries, and the NY PSC agreed.<sup>14</sup>

Under the Telecommunications Act of 1996, the Commission can only preempt a state commission where the state commission "fails to act to carry out its responsibility under this section in any proceeding or other matter under this section."<sup>15</sup> The NY PSC has determined that in the State of New York reciprocal compensation should be paid for

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Compensation (Aug. 26, 1999) at 58-59 ("Opinion No. 99-10") (attached to MCImetro's Petition as Exhibit 2).

<sup>13</sup> Opinion No. 99-10 at 56-57.

<sup>14</sup> NY PSC Case 99-C-0529, Letter from Joseph A. Post, Esq. Verizon to Janet Hand Deixler, Secretary, NY PSC (Mar. 20, 2001) at n. 1: "'the reciprocal compensation agreements in the MCIMETRO agreement are not subject to the Opinion 99-10 presumption'" (attached to MCImetro's Petition as Exhibit 3); *quoting* NY PSC Case 99-C-0529, Order Rejecting Rebuttal Presentation (Feb. 1, 2001) at 6.

<sup>15</sup> 47 U.S.C. § 252(3)(5).

calls to ISPs under interconnection agreements, including this one. Because the NY PSC has not "failed to act" on the issue Verizon identifies, preemption with respect to that issue is improper.

## **CONCLUSION**

The Commission has the appropriate authority to resolve completely the dispute that is before it and ensure that all parties have an ample opportunity to present their arguments. The Commission should reject Verizon's attempt to relitigate issues that the New York Public Service Commission has resolved and deny Verizon's Petition for Clarification or Reconsideration.

Respectfully submitted,

MCI METRO ACCESS  
TRANSMISSION SERVICES LLC

Of Counsel: Darryl M. Bradford  
John J. Hamill  
JENNER & BLOCK LLC  
One IBM Plaza  
Chicago, Illinois 60611  
(312) 222-9350

/s/ \_\_\_\_\_  
Lisa R. Youngers  
Kecia B. Lewis  
WORLDCOM, INC.  
1133 19th Street, N.W.  
Washington, D.C. 20036  
(202) 736-6325

Dated: January 14, 2003

## Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this fourteenth day of January, 2003, I have caused to be served by United States Postal Service first class mail and e-mail a true and correct copy of MCImetro Access Transmission Services' Opposition to Verizon's Petition for Clarification or Reconsideration in the matter of WC Docket No. 02-283 on the following:

Marlene H. Dortch \*  
Secretary  
Federal Communications Commission  
445 Twelfth Street, NW  
Washington, DC 20554

Tamara L. Preiss \*  
Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 Twelfth Street, NW  
Washington, DC 20554

Kathleen O'Neill \*  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 Twelfth Street, NW  
Washington, DC 20554

Jodie Donovan-May \*  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Qualex International \*  
Portals II  
Federal Communications Commission  
445 Twelfth Street, SW  
Room CY-B402  
Washington, DC 20554

Janet Hand Deixler +  
Secretary  
New York Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

Sandra DiIorio Thorn +  
Verizon New York Inc.  
1095 Avenue of the Americas  
New York, NY 10036

John M. Goodman +  
Attorney for Verizon New York  
1300 I Street, N.W.  
Washington, D.C. 20005

/s/  
Lonzena Rogers

\* Denotes E-Mail

+ Denotes U.S. Postal Service